STATE OF MICHIGAN

COURT OF APPEALS

FIFTH THIRD BANK,

Plaintiff-Appellee,

v

ROBERT J. TAYLOR and SHARON A. TAYLOR,

Defendants-Appellants.

UNPUBLISHED
August 21, 2007

No. 269872
Monroe Circuit Court
LC No. 04-019100-CK

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order granting judgment in plaintiff's favor for late charges and interest on the promissory note held by plaintiff. Defendants also challenge the trial court's previous order granting partial summary disposition to plaintiff, holding defendants liable for payment of the principal of the note. We affirm.

I. FACTS

Defendants entered into a loan with plaintiff to obtain temporary financing to use the equity in their present house to build a new house. Defendants executed a second mortgage on their present house to secure the loan. The loan consisted of five monthly payments and one balloon payment. When the balloon payment came due, defendants sought a renewal of the loan at the same interest rate. Plaintiff made several offers to renew the loan, but defendants refused the loan renewal, retained counsel, and mailed plaintiff their house keys, claiming that plaintiff had breached the contract. Plaintiff then filed a complaint for the amount of the balloon payment and interest owed on the note. Defendants contested plaintiff's complaint, arguing that they had provided the collateral for the loan by sending the keys to plaintiff. Plaintiffs then filed a motion for summary disposition, which the trial court granted as to the balance of the loan. Further, post-trial, the trial court entered a judgment in plaintiff's favor for late charges and interest. Defendants now appeal.

II. TIMELY APPEAL

First, plaintiff alleges that defendants did not timely appeal because they did not file an application for leave to appeal within 21 days of the trial court's October 11, 2005 order granting partial summary disposition to plaintiff. A party has an appeal of right only from a final order.

Dean v Tucker, 182 Mich App 27, 30; 451 NW2d 571 (1990). A final order is an "order that disposes of all the claims and adjudicates the rights and liabilities of all the parties. . . ." MCR 7.202(6)(a)(i); *American Federation of State, Co & Muni Employees v Detroit*, 468 Mich 388, 397; 662 NW2d 695 (2003). The order granting partial summary disposition was not a final order because it did not dispose of all claims. Defendants could have filed an interlocutory application for leave to appeal the order granting partial summary disposition within 21 days after entry of the order. MCR 7.205(A). However, parties are not required to file interlocutory appeals to preserve the issue for appeal. *Janczyk v Davis*, 125 Mich App 683, 688 n 1; 337 NW2d 272 (1983). Defendants timely filed a claim of appeal from the final judgment, entered April 4, 2006, with this Court on April 20, 2006. When a party files a claim of appeal from a final order, the party is then free to raise on appeal issues related to other orders in the case. *Dean, supra* at 31. Therefore, plaintiff's argument is without merit.

III. SUMMARY DISPOSITION

Defendants argue that summary disposition on the principal balance of the loan in favor of plaintiff was not proper because the balance remaining on the note should have been mitigated by defendants' conveyance of the property to plaintiff. We disagree.

A. Standard of Review

A motion for summary disposition made under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

There is a genuine issue of material fact when reasonable minds could differ upon an issue after viewing the record in the light most favorable to the nonmoving party. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court must limit its review to the evidence presented up to the time plaintiff's motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

If the language of a contract is clear and unambiguous, construction of the contract is a question of law for the court, and factual development to determine the intent of the parties is unnecessary. *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997). "When a contract is unambiguous, it must be enforced according to its terms." *Hamade v Sunoco Inc*, 271 Mich App 145, 166; 721 NW2d 233 (2006). There is a presumption that the parties intended the terms of the contract, and their subjective perceptions are irrelevant to the contract's construction. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).

B. Analysis

At the hearing on the motion, plaintiff argued that defendants simply failed to make the final payment as required by the contract. The promissory note provided for five monthly payments of $1,354.29, beginning in January 2004, and one final payment of $314,500 on June 10, 2004. Defendants disputed the amount of the principal due under the note on the sole basis that they provided the collateral to plaintiff by delivering the keys to the premises. Plaintiff contended that the tendering of the keys to the house was irrelevant because it was not equivalent to the transfer of ownership. Defendants stated that plaintiff never replied to the tendering of the keys but took possession by entering the property, winterizing the house, and shutting off the water.

The trial court agreed with plaintiff that there was no question that defendants owed the amount due on the note and that the tendering of the keys did not give plaintiff any legal authority to sell the property to mitigate the loan amount. The court granted summary disposition for the amount of principal due, $314,500, but concluded that there was a genuine dispute over the amount of interest, so that issue would go to trial.

The contract specifically provides that defendants have an obligation to maintain the premises, and in the event of a default, plaintiff may maintain and repair the property at defendants' expense. In addition, upon default, plaintiff may demand defendants to deliver the collateral, and defendants would be responsible for the costs of disposition of the property and any deficiency. This provision expressly contradicts defendants' allegation that plaintiff is estopped from denying acceptance of the underlying security in full satisfaction of the promissory note in lieu of its right to foreclose or to sue on the note. Plaintiff had not yet demanded delivery of the collateral when defendants mailed the keys, and there is no provision whatsoever stating that handing over the collateral would fully satisfy defendants' obligations under the note.

Defendants' contention that the tender of the keys, accompanied by a letter stating that they were returning the house because plaintiff breached the contract, constituted a conveyance of the property to plaintiff is without merit. First, this letter is not a part of the lower court file and was never admitted into evidence at the hearing on the motion, so it cannot be considered on appeal. *Peña, supra* at 313 n 4. Even if it could be considered on appeal, it does not meet the requirements for a conveyance of the property. "A conveyance of an interest in land must be in writing and comport with the statute of frauds, MCL 566.106." *Marina Bay Condos, Inc v Schlegel*, 167 Mich App 602, 606; 423 NW2d 284 (1988). The writing must contain all essential terms, including the parties, property, and consideration, and must be signed by the party to be held to the agreement. *Kojaian v Ernst*, 177 Mich App 727, 730-731; 442 NW2d 286 (1989). The substance of a contract for the sale of land is governed by contract law and requires mutual assent of the parties. *Zurcher v Herveat*, 238 Mich App 267, 282; 605 NW2d 329 (1999). It is clear from the evidence that there was no mutual assent between the parties that defendants conveyed the property to plaintiff. At the hearing, the trial judge even commented on defendants' failure to offer plaintiff a quitclaim deed to allow it to sell the house, and defendants' counsel responded that they were not making such an offer. The trial court did not err in concluding that defendants owed the balance remaining on the note, and there was no conveyance of the property that mitigated this amount.

IV. CONTRACT INTERPRETATION

Next, defendants argue that the trial court erred in finding them liable for a late charge and penalty rate of interest because the parties' agreement included a six-month automatic renewal of the loan at the same interest rate, so plaintiff breached the contract. We disagree.

A. Standard of Review

The trial court's interpretation of a contract is reviewed de novo, and its findings of fact are reviewed for clear error. *Burkhardt*, *supra* at 646-647.

B. Analysis

The parol evidence rule bars the admission of evidence of prior or contemporaneous agreements that vary or contradict a written contract which the parties have intended to be a complete and integrated expression of their agreement. O*mega Const Co*, *Inc v Murray*, 129 Mich App 509, 514; 341 NW2d 535 (1983). The integration of the negotiations is a threshold issue in the interpretation of a contract. *Id.* at 515. An express integration or merger clause within the agreement is conclusive, and extrinsic evidence is only admissible to show fraud in the clause itself. *Hamade*, *supra* at 169. In this case, there was no integration or merger clause in the contract, so parol evidence was admissible to determine the issue of integration. *Id.* at 167.

In addition, parol evidence is admissible to demonstrate: (1) that the writing was not intended to create a legal relationship, (2) fraud, illegality, or mistake, or (3) that the agreement was only partially integrated because essential elements were not reduced to writing. *Hamade*, *supra* at 167-168. However, "[t]he judiciary may not rewrite contracts on the basis of discerned 'reasonable expectations' of the parties because to do so 'is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit. . . .'" *Burkhardt*, *supra* at 656-657 (citation omitted).

At trial, Keith John Golembiewski, a mortgage loan officer with plaintiff, testified that defendants inquired about a bridge loan and end-loan financing because they wanted temporary financing that would allow them to use a portion of the equity in their present house to build a new house. Golembiewski was present when defendant, Sharon Taylor, applied for the bridge loan, and he took notes by hand during their meeting. Plaintiff's bridge loan was a six-month loan with five monthly payments and one balloon payment. On December 10, 2003, the parties entered into the six-month loan agreement for the amount of $314,987, with a four percent interest rate. The note would mature and the final balloon payment of $314,500 would become due on June 10, 2004. The interest rate was the prime rate at the time and was fixed for the term of the loan.

The agreement called for a late fee of five percent of the amount past due any time a payment was more than ten days late. There was also a default provision that allowed acceleration of the loan and an increase of the interest rate to ten percent if the balloon payment was not made. Defendants made the first five payments but failed to make the balloon payment. Defendants incurred a late charge, and 30 days after the loan became due, the interest rate increased to ten percent. Golembiewski testified that it was plaintiff's policy to give renewals to bridge loans if the customer still met certain conditions, such as income, credit, and payment

history. However, there was nothing in the mortgage or note regarding plaintiff's renewal policy.

Plaintiff objected to the admission of Golembiewski's handwritten notes from his meeting with Sharon on the grounds of the parol evidence rule. Golembiewski testified that the note was the complete loan document containing all the terms and conditions of the agreement. The court concluded that the handwritten notes were relevant to demonstrate defendants' claims that there were misrepresentations made regarding a subsequent renewal loan and allowed their admission. Golembiewski's notes stated, "Bridge loan equals a payoff on the first mortgage; 6-month loan, with one renewal; simple interest; interest only payments; 5-month repayment."

Golembiewski stated to Sharon that if the house did not sell within the six months, plaintiff could get a one-time renewal under certain conditions. Sharon testified that Golembiewski represented that if the house did not sell, defendants could obtain an automatic renewal with the same interest rate and conditions if they qualified. Golembiewski could not remember whether he told Sharon that if she renewed after six months, she could receive a higher interest rate if the prime rate increased. Sharon testified that Golembiewski did not say the rate could change or that there would be additional closing fees. Sharon admitted that the handwritten notes did not say that the renewal would be on the same terms, conditions, and interest rate.

Amy Navarre, an office manager for plaintiff, contacted defendants to discuss renewing the bridge loan in June 2004 because the loan had come due, and defendants had not yet sold their house. When defendants attempted to renew their loan, they were offered an interest rate of 5.74 percent. Defendants asked Navarre to discuss the matter with Golembiewski, and Navarre did. Navarre told defendants she had to discuss the matter with someone in a higher office and would get back with them. Golembiewski testified that defendants should have received the prime interest rate at that time, so he began making inquiries regarding the interest rate. Golembiewski could not remember with certainty what the prime rate was at that time.

Defendants were offered a renewal at four percent plus closing costs, but defendants refused to sign. Defendants were also offered the higher rate with no closing costs or fees. At some point in the following two weeks, plaintiff offered to waive the fees for the renewal at four percent and to waive the late fee, but defendants did not accept the offer. This final offer was for a higher loan amount because the per diem interest that had accrued in the interim was added to the amount owed. Plaintiff made this offer for the purpose of settling the dispute. Sharon testified that defendants did not accept the offer at this point because they had already retained counsel and mailed plaintiff the keys to the house with a letter stating that they were no longer willing to negotiate because plaintiff breached the agreement.

The trial court found that the contract did not provide for a renewal of any kind, and a renewal would have had to be in writing to satisfy the statute of frauds. The renewal was not automatic, defendants had to qualify, and defendants knew they had to do something to get the renewal in effect, which is why they went to the bank to meet with Navarre. The trial court also concluded that defendants were not promised a four percent renewal rate because there was no meeting of the minds on the issue. In addition, the offer of a renewal at four percent plus default interest was more than fair, and defendants rejected the offer. Defendants were in default, and

the default interest and late charge provided for in the contract were appropriate. Plaintiff elected to sue on the note rather than foreclose, and defendants still held title to the property.

The trial court correctly concluded that parol evidence was admissible because there was a dispute that the note was the complete and integrated expression of their agreement. *Hamade, supra* at 167-168. The trial court also correctly decided that the handwritten notes were insufficient evidence that the contract included an automatic renewal or a promise of a renewal on the same terms and conditions. Sharon admitted that defendants would have to qualify for the renewal and that the notes did not say that the renewal would be on the same terms, conditions, and interest rate. "[L]enders and borrowers frequently enter into preliminary discussions of whether a loan will be refinanced or further credit will be extended," and general discussions of extending credit should not "lead a borrower to reasonably believe that credit will be extended." *Farm Credit Services v Weldon*, 232 Mich App 662, 672-673; 591 NW2d 438 (1998). Therefore, defendants were not entitled to a six-month renewal of the loan at the four percent interest rate, and the trial court did not err in enforcing the higher interest rate and late fee penalties as provided for in the contract.

Affirmed.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello